INDEX

CITATIONS

CASES: Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 80

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE sitting as a Judge of That Court, and CITIES SERVICE GAS COMPANY, *Respondents*.

No. 81

TEXACO, INC., *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE sitting as a Judge of That Court, *Respondents*, and CITIES SERVICE GAS COMPANY, *Intervening Respondent*.

On Writ of Certiorari to the Supreme Court of Delaware

Petitioners' Answer to Motions of Atchison, Kansas, et al., and Colorado Interstate Gas Company for Leave to File Briefs Amici Curiae in Support of Respondents

---

As answer to Motions for Leave to File Briefs *Amici Curiae* in Support of Respondents, Petitioners submit:

1. Atchison, Kansas, *et al.*, (the municipalities) have filed their Motion "out of an abundance of caution" (Mun. Motion, p. 2). Petitioners declined consent to their filing a Brief *Amici Curiae*, but assume that as political sub-

divisions of the states of Kansas and Missouri, the municipalities will be permitted to proceed under Rule 42(4). Appended hereto is Petitioners' reply to the municipalities' Brief.

2. Petitioners did not consent to the filing of a Brief *Amicus Curiae* by Colorado Interstate Gas Company (Colorado). Colorado's Motion does not set forth matters which materially distinguish an argument by Colorado on the jurisdictional questions at issue, from argument of Cities Service Gas Company (Cities), a named respondent. Colorado discusses rate relationships between it and its customers controlled by orders under the Natural Gas Act. Colorado further discusses rate relationships between Colorado and its suppliers which are also subject to Federal Power Commission orders and Sections 4 and 19 of the Act. These matters are not of record here, but could be properly disposed of in actions under Section 22 of the Act. (*Cf.*, Colo. Motion, p. 3). Colorado's rights and status obviously depend upon its own proper pursuit of administrative remedies and statutory procedures. The effect thereon of a decision upon jurisdictional questions here raised by activities of the Delaware courts, thus must depend upon facts of record in Colorado's collateral proceedings.

3. In large measure, Colorado's Brief closely parallels that of Cities. Differences apparently are the result of Colorado's unfamiliarity with the factual background during the period from 1954 to the present, and with development of Commission regulation of producers' rates since June 7, 1954. Upon such a predicate, where Colorado departs from Cities' arguments, it is to urge a possibly wider area of "concurrent" state and federal jurisdiction over a regulated rate. Petitioners have appended hereto necessary references to correct Colorado's predicate, and their demonstration of the errors of Colorado's contentions.

For the foregoing reasons, it is respectfully submitted that the Motion for Leave to File Brief by Colorado Interstate Gas Company should be denied.

John J. Wilson
Frank H. Strickler
815 Fifteenth St., N. W.
Washington 5, D. C.

Paul F. Schlicher
135 East 42nd St.
New York 17, N. Y.

Alfred C. DeCrane, Jr.
P.O. Box 2332
Houston 1, Texas

Attorneys for Petitioner in No. 81

Byron M. Gray
New England Building
Topeka, Kansas

William J. Grove
Carroll L. Gilliam
Dow, Lohnes and Albertson
600 Munsey Building
Washington 4, D. C.

Attorneys for Petitioner in No. 80

L. A. Thompson
W. W. Heard
P.O. Box 591
Tulsa 2, Oklahoma

Of Counsel in No. 80

April, 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 80

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE sitting as a Judge of That Court, and CITIES SERVICE GAS COMPANY, *Respondents*.

No. 81

TEXACO, INC., *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE sitting as a Judge of That Court, *Respondents*, and CITIES SERVICE GAS COMPANY, *Intervening Respondent*.

On Writ of Certiorari to the Supreme Court of Delaware

Petitioners' Reply to Briefs of Atchison, Kansas, et al., and Colorado Interstate Gas Company, as Amici Curiae in Support of Respondents

INTRODUCTORY STATEMENT

Briefs of the *Amici Curiae* echo that of Respondent Cities Service Gas Company (Cities). Petitioners have filed replies to Cities and respectfully refer thereto for dis-

cussion of arguments of the *Amici Curiae* which repeat Cities' contentions.

The municipalities' purpose apparently is to support implications that Cities' theories are consistent with purposes of the Natural Gas Act, while Petitioners' are not. Actually, Petitioners' position accords with acts of the Federal Power Commission affecting consumer interests, while Cities' theories render Commission procedures and statutory provisions nugatory. Much of the municipalities' argument thus rests upon assumption that the rate relationship between Petitioners and Cities is not now completely subject to paramount federal control. However, the effective 11 cent rate level not only is controlled by the Act, but has been recognized as consistent with consumer interests by the Commission in the exercise of its primary jurisdiction over Petitioners' rate.

Colorado Interstate Gas Company (Colorado) primarily urges that a producer "natural-gas company's" rate may be concurrently controlled by alleged "common-law" rights enforceable in courts of general jurisdiction. Such a theory is not only inconsistent with the Act's exclusive jurisdiction provisions, but also would mean that practical control of the rate would evolve into state courts and, as Colorado suggests, the federal courts under diversity jurisdiction.

I. REPLY TO THE MUNICIPALITIES AS AMICI CURIAE

A. The rate relationship between the municipalities and Cities, controlled by the Act, is subject to Cities' compliance with statutory conditions precedent

Like Cities, the municipalities refer to a Commission order in FPC Docket No. G-2410 which is said to reserve to Cities' "jurisdictional" customers contingent rights against Cities (Mun. Motion, pp. 2, 5; Mun. Br., pp. 2, 3, 6, 13, 17, and 18).

That order was issued in a Section 4 proceeding involv-

ing Cities' rates.[1] Petitioners' own rates under Section 4 were not in issue in that proceeding and were not there determined. Petitioners are not named in the Commission order, nor has either ever been "one of the companies" referred to by general statements in that order (R. 556-586). That order thus may well vest some contingent rights against Cities, but Cities' rights insofar as Petitioners and their effective rate are concerned, were not determined by that order. Each producer who sells to

---

[1] Only what is termed a "refund order" is of record here. Source of figures is not revealed. Apparently the figures are derived outside this record by subtracting substantial amounts Cities would retain because "non-jurisdictional" customers would not have "refund rights" under a Commission order. Significantly, Cities has not expressed agreement here with percentages the municipalities may have used. It may be noted, however, that calculations and actual purposes of the Kansas municipalities here on Cities' behalf are particularly unclear in the light of the statutes. In this respect, the Kansas Corporation Commission has already stated in other contexts that *if* "refunds" of the type the municipalities refer to, actually ever occurred, *after* compliance with all statutes involved, approximately 80% would be "windfalls" to pipelines such as Cities, and only 20% could ever reach distribution companies. Of this latter amount, the Kansas Commission stated:

> "... we believe we have no jurisdiction to compel refunds to consumers by distributing companies and any refunds by Cities Service Gas to Kansas distributors will simply be a windfall to the distributing companies without any benefit whatever to the consumer. We think it likely the other state regulatory bodies may be similarly circumstanced." "

(Petition for Writ of Certiorari to the Supreme Court of Kansas, State Corporation Commission of Kansas, *et al.* v. Cities Service Gas Company, No. 302, Oct. Term 1959, pp. 12-13). See also this Court's reference to such questions in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), noting a statement that if a distributing company "recoups again what it has already recouped from the public, there is no machinery in or out of court by which others who have paid unreasonable charges to it can recover." (341 U.S. at 254).

Cities and who is a "natural-gas company" under the Act has its own separate, effective rate under Section 4. Applicability of any provisions of the order to which the municipalities refer thus is always dependent upon the legal relationship between such a regulated producer and Cities, as determined by Commission action under Section 4 upon that producer's rate.

The Commission order and any contingent rate relationship between the municipalities and Cities have not authorized either Cities, Petitioners, or the municipalities to attempt enforcement of rights or liabilities outside the framework of the Act. The municipalities themselves rely upon Commission orders under Section 4 as defining and creating contingent rights against Cities. The order to which they refer thus is subject to all conditions precedent and jurisdictional strictures of the Act, and at no time has the Commission authorized, encouraged, or indicated approval of state court intrusion into the federal regulatory process.

Operation of an order of the type issued in Docket No. G-2410 is illustrated by the Socony-Mobil Oil Company, Inc. (formerly Magnolia Petroleum Company) orders set forth in Appendices by the municipalities and Cities. There, Cities proceeded first through the administrative process, then into the Court of Appeals under Section 19(b), and finally to a judgment in the United States District Court for the District of Kansas. (See Mun. Br., App. A and B; Cities Br., App. E). Thereafter, the Commission entered the order in Appendix E to Cities' Brief, recognizing that statutory conditions precedent had been met and statutory procedures followed, and entering further orders consistent with the order in Docket No. G-2410.

Here, by contrast, none of these conditions precedent has been met, and the facts are to the contrary. The municipalities did not proceed under the Act. For its own rea-

sons. Cities also did not proceed before the Commission, has not proceeded into the Courts of Appeals, and has not proceeded under Section 22 of the Act. Cities merely seeks to bypass all of these procedures by litigation over a completely regulated rate relationship in the state courts. Accordingly, no matter what contingent rights the municipalities may have against Cities, it is clear that the municipalities must have misinterpreted Commission orders and the nature of the relationship between Petitioners and Cities, as "natural-gas companies" under the Act.

"Consumer interests" to which the municipalities refer also are subject to jurisdiction and orders of the Kansas Corporation Commission and the Missouri Public Service Commission, but only after Cities itself properly complied with the Act. Whether those authorities would, or can, rule that Cities and regulated distribution companies must, or even legally could, further make "refunds" to ultimate consumers, depends upon statutory provisions and regulatory controls of such state bodies. This record does not include such facts or authorities on these questions. They also are not revealed by the municipalities.[2] Accordingly, it cannot be assumed here that results discussed by the municipalities could actually obtain, or have obtained, if a dispute between Cities and a regulated supplier has been resolved, or is resolved, in a proper forum.

Cities' customers thus may have some enforceable contingent rights against Cities, or valid grounds for attacking Cities' rates. However, none of these matters is at issue here; each must be resolved under the statute applicable; and none is controlling upon questions actually at issue at this juncture.

[2] See footnote 1, *supra*.

B. The rate relationship between Cities and Petitioners is governed exclusively by the Act

Since Cities and Petitioners are all "natural-gas companies," their respective rates are regulated under Section 4. However, the municipalities apparently do not recognize the inconsistency between their total reliance here upon Commission orders as to their own relationship with Cities, and their argument that the relationship between Cities and Petitioners is controlled by concepts of "common-law," or "general law," and that a state court has jurisdiction.

The municipalities' argument appears predicated upon an assumption that under Section 4, control of the rate relationship between a producer and a pipeline company has not changed since *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672 (1954). Obviously, since June 7, 1954, the rates of any producer subject to the Commission's jurisdiction fall within the paramount scope of the Act, and *once* a rate is effective under Section 4 that rate controls rights and liabilities.

Nevertheless, the municipalities mistakenly state:

> "It [the Act] has no application to cases where the action is a common-law one arising out of an initial rate established by contract alone with respect to which there has been no action of the Commission under Section 5(a) of the Act." (Mun. Br., p. 4)

And further argue:

> ". . . the exclusive jurisdiction provision of Section 22, cannot be interpreted to preclude state courts from exercising jurisdiction over actions arising out of contracts unimpaired by the Act, but merely filed with the Commission, where as in these cases, there has been no exercise by the Commission of its powers to review the reasonableness of such rates under Section 5(a)." (Mun. Br., p. 10)

And then conclude:

> "Nothing the Commission does with respect to an initial rate filing can have any effect on the rates fixed by the contract filed." (Mun. Br., p. 11)

"This, of course, tears Section 4, as well as Section 19, out of the statute.

Since the opening of the 1954 proceeding governing Cities' rates in which at least one or more of these municipalities apparently participated, the Commission has issued the extensive Regulations governing producers' filings under Section 4. If the municipalities were correct here, however, not one of the thousands of Commission actions under Section 4 since June 7, 1954, has binding effect. If that were so, all of the litigation over Commission acts under Section 4 determining the effective rate level in cents-per Mcf, also should never have proceeded into the federal Courts of Appeals, because jurisdiction over such controversies was still in the state courts.[3]

Obviously, the municipalities are incorrect. The federal Courts of Appeals have been correct as to their juris-

---

[3] *E.g.*, *Magnolia Petroleum Company* v. *Federal Power Commission*, 236 F. 2d 785 (5th Cir. 1956), *cert. den.*, 352 U.S. 969 (1957); *Bel Oil Corp.* v. *Federal Power Commission*, 255 F. 2d 548 (5th Cir. 1958), *cert. den.*, 358 U.S. 804 (1958); *Cities Service Gas Producing Co.* v. *Federal Power Commission*, 233 F. 2d 726 (10th Cir. 1956), *cert. den.*, 352 U.S. 911 (1956); *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958), *cert. den.*, 358 U.S. 837 (1958); *Continental Oil Co.* v. *Federal Power Commission*, 236 F. 2d 839 (5th Cir. 1956); *Episcopal Theological Seminary, et al.* v. *Federal Power Commission*, 269 F. 2d 228 (D.C. Cir. 1959), *cert. den.*, 361 U.S. 895 (1959); *Federal Power Commission* v. *Union Producing Co.*, 230 F. 2d 36 (D.C. Cir. 1956); *Kerr-McGee Oil Industries, Inc.* v. *Federal Power Commission*, 260 F. 2d 602 (10th Cir. 1958); *Natural Gas Pipe Line Co. of America* v. *Federal Power Commission*, 253 F. 2d 3 (3rd Cir. 1958), *cert. den.*, 357 U.S. 927 (1958); *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F. 2d 470 (10th Cir. 1955); *Phillips Petroleum Co.* v. *Federal Power Commission*, 258 F. 2d 906 (10th Cir. 1958); *Signal Oil and Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771 (3rd Cir. 1956); *Sunray-Mid-Continent Oil Co.* v. *Federal Power Commission*, 270 F. 2d 404 (10th Cir. 1959); *Warren Petroleum Corp.* v. *Federal Power Commission*, 282 F. 2d 312 (10th Cir. 1960).

diction under Section 19(b), and as to the binding effect of Commission actions since June 7, 1954 under Section 4—such as appear in this record. The municipalities thus mistakenly assume that bars to state court jurisdiction preclude protection of consumers, or alleged contingent rights. This, of course, is incorrect since Section 22 also applies.

In response to Cities and in Main Briefs, Petitioners have made references to the record of Cities' shifts and interjection below of the question of the legal rates under the Act; have demonstrated the nature of the subject matter actually before the state court; have discussed Cities' citations repeated now by the municipalities; and have shown that it is Petitioners' position—not that of Cities—which is consistent with the "rationale of Mobile, Memphis and CATCO." (See Pan American Main Br., pp. 25-47, 51-57). These are the only constructions of Sections 4, 19, and 22 compatible with the *Mobile* holding and with jurisdictional proscriptions of the Act. It is only by adherence thereto that federal regulation of the rate—the matter of concern to consumers—can exist.[4]

The municipalities thus summarize the state court's action in terms reflecting a state court's intrusion upon Sections 4, 19 and 22:

> "It [the state court] merely determined that subsequent t this court's invalidation of the Kansas Minimum Price Order, the filed rates protected by *Montana-Dakota* were the contract rates filed with the Commission unchanged by the void Kansas Minimum Price Order, which contract rates under *Mobile* could not be varied by any act of the Commission except by modification after a hearing and finding of unlawfulness under Section 5(a)." (Mun. Br., p. 16)

[4] For example, Docket No. G-2410, in which the order affecting Cities' rates was issued, was originally instituted *under Section 4* (R. 556, 557), but see Mun. Br., p. 4 and pp. 10-11, quoted *supra*.

Petitioners have shown that such actions and their "enforcement" by a state court totally nullify Commission jurisdiction under Section 4, exclusive review provisions of Section 19, and Section 22. Petitioners' own rates like Cities' rates, are subject only to the regulatory strictures of the Act. Neither Cities nor the municipalities have received authorization—nor could they—from the Commission for proceeding outside the framework of the Act in state courts.

C. The 11 cents-per-Mcf rate level has been recognized as consistent with consumer interests

Apparently, the municipalities have also unknowingly placed themselves in the questionable position of first having long reaped the benefits of the 11 cents rate—found by two regulatory commissions to be in the public interest—and then joining in belated attacks here.

No regulated company disputes the primary purpose of the Act. "Reasonable" rates are required. Petitioners, however, like any regulated company, at the same time are granted a means of rate stability, and are accorded processes of the Act for protection of rights and determination of liabilities. Yet, the municipalities here use language of castigation—"brazen," "windfall," "illegal," and so on—presumably to create an aura of "exploitation," but the adjectives are improper.

As to history, the old Kansas order was designed to protect consumer interests, to encourage drilling and sales of gas to pipelines reselling for use by ultimate consumers, and to discourage waste and inferior uses of gas produced in the Hugoton Field. These were the purposes of the Kansas Commission when it initially determined that an 11 cents price was required and in the public interest. In part, the Kansas Commission also was required to act because of adverse effects of monopolistic power of a few pipeline companies—including Cities. These matters

are the subject of extensive public records, including Federal Power Commission Report to Congress, 1948, (Olds-Draper Report, p. 10; Smith-Wimberly Report, pp. 9, 232), *Kansas-Nebraska Natural Gas Co. v. State Corporation Commission*, 169 Kan. 722, 733, 222 P. 2d 704, 713.

More recently, the Federal Power Commission has recognized that a rate of 11 cents-per-Mcf is acceptable, in the public interest, and consistent with consumer protection, for sales in Kansas under rate schedules already on file. That Commission has further recognized that a rate of 16 cents-per-Mcf is required by the public convenience and necessity for new sales, and to maintain adequate supplies in the State of Kansas. See FPC Statement of Policy No. 61-1, 25 Fed. Reg. 9578-9579 (Oct. 5, 1960).

The municipalities cannot be unaware of Cities' conduct from 1954 through 1958. From that conduct any reasonable person, and apparently the Federal Power Commission itself, could but conclude that producers' rates of 11 cents-per-Mcf on file and effective under the Act, were stable, unquestioned, and accorded statutory finality. Correctly assuming that certainty had been achieved and that a stable rate relationship existed, Petitioners and many other producers went forward during these years with substantial investments in the Hugoton Field, with development of acreage, and with all of the activities necessary to bring forth increased gas supplies. These municipalities, as customers of Cities, have, of course, long received and consumed such supplies, and reaped the benefits of the acts of the two regulatory bodies which will now continue far into the future. In a proper forum, Petitioners have always been prepared to submit these facts, and to catalog Cities' course of conduct from 1954 until it suddenly launched collateral attacks in 1958. Here, the municipalities, nevertheless, join in attack upon a rate which Cities did not protest in a timely manner. The joinder is wholly

misplaced, actually contrary to short- or long-term consumer interest in preserving statutory procedures, and differs from conclusions of two regulatory bodies having primary jurisdiction over protection of consumer interests.

Petitioners do not dispute the municipalities' belief that they may have some contingent rights against Cities in any situations where Cities itself has properly complied with statutory conditions precedent inherent in an order of the type the municipalities mention so frequently. However, these matters are not germane at this juncture, and an attack upon the 11 cents-per-Mcf rate level as contrary to "consumer protection" is inappropriate as well as without foundation. The municipalities thus argue from the very apparent assumption that a producer's rates remain subject only to control by private "agreement" with Cities. This flows from basic misunderstanding of Commission actions under Section 4, and highlights the similar erroneous premise of the Delaware state courts.

II. REPLY TO COLORADO INTERSTATE GAS COMPANY AS AMICUS CURIAE

Colorado seems to argue primarily for a "concurrent" state and federal law "source" and fora for control of the regulated rate. Thus, Colorado says ". . . where the same circumstances give rise to both common law and federal rights, the choice of which set of rights to assert . . . rests exclusively with the plaintiff . . ." (Colo. Br., p. 11); and, further, that despite "paramount power" of the Commission, "a contract remains binding and enforceable upon the parties as a contract." (Colo. Br., p. 17).

Like the municipalities, Colorado thus errs by reading the *Mobile* case as having written binding effect of Section 4 and Commission actions thereunder completely out of the Act.

A. Alleged ancillary "agreements" cannot control a regulated rate

Insofar as history of this controversy is concerned, Colorado is completely in error as to factual or legal existence of ancillary written or implied "agreements" which Cities began to discuss only in 1958. Petitioners have discussed this point in response to Cities, and are prepared to so demonstrate in a proper forum. (See also R. 620-635).

Colorado also has ignored the record as to all of Cities' allegations below, its position there, and the ultimate revelation of the actual subject matter (R. 619-620, 278-281, 282-554, 589-607, 764, 766, 767, 768, 770, 771, 775, 777-778). Contrary to Colorado's reconstruction of what occurred, the trial court thus concluded ". . . both parties agreed that as to the period after July 16, 1954, at least no rate may be asserted as a legal right that is other than the filed rate" (R. 8, 12-13). Nevertheless, Colorado, like Cities, still attacks the control and disputes the binding legal effect of Commission procedures set up to regulate producers' rates under Section 4 (Colo. Br., pp. 19-38).

Most, if not all, of Colorado's argument collapses when one controlling point is kept in mind: as the trial court recognized, the rate on file under Section 4 is the only "legal rate." That rate defines in cents-per-Mcf, at any point in time, the only "rate" that "may be asserted as a legal right." While it is correct that *prior* to filing, parties may contract and agree as to a rate, the right to charge, the obligation to pay, and binding legal effect depend exclusively upon *subsequent* tender, acceptance, and effectiveness through the processes of, and Commission action under, Section 4. It is the Act which pin-points the legal rate in cents-per-Mcf, regardless of antecedent agreement or documents tendered. This results in inevitable legal consequences in the exclusive jurisdictional fora established by Sections 4, 19, and 22.

The "legal rate" thus may be different from what one party or another thought the rate should have been or should be—the Commission may have read the documents differently, or erred in the view of buyer or seller. However, this cannot change the binding effect of the rate under Section 4 as the only legal source of the rate and rights and liabilities of either party. The exclusive procedures for review and enforcement under the Act still apply. These procedures do not turn upon a "source" of an *antecedent* relationship that does not and cannot fix the "legal rate," nor do they turn upon afterthoughts or actions in a state court. The Act is not unique in resting upon this system of permissible, initial private agreements, *but* in which the actual rate relationship is dependent solely upon federal law for effectiveness, "source" of rights, and exclusive control of legal consequences *after* the statutory process touches a permissible private agreement. Compare *Railway Employes' Department* v. *Hanson*, 351 U.S. 225, 230-233 (1956); *Local 24 of International Brotherhood of Teamsters, etc.* v. *Oliver*, 358 U.S. 283, 292-294, 296-298 (1959).

Mobile is compatible with these statutory processes, but Colorado also does not reach the question of legal rate and exclusive federal source of rights and liabilities *after* filing under Section 4 and Commission action under that section.

B. Concepts discussed by Colorado do not apply where the subject matter is an exclusively regulated rate

Colorado first discusses "historical perspective," but ends only with conclusions that (1) state court intrusion is "permissible" after reference solely to an initial complaint (Colo. Br., p. 10), and (2) the Act permits a plaintiff an option of a "choice of rights" with respect to a regulated rate, enforceable in state or federal courts of general and diversity jurisdiction (Colo. Br., p. 11).

Petitioners do not dispute historical development of the "federal question" rule (Colo. Br., p. 10), but have pointed

out in response to Cities that this is not the test of *state* jurisdiction over this subject matter, and is not controlling in these circumstances in construction of the "exclusive jurisdiction" provision of Section 22.

Distinctions are illustrated by Colorado's misplaced reliance upon *Skelly Oil Co., et al.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950) (Colo. Br., pp. 5, 7, 8, 9, 10). The question at issue in *Skelly* was enforcement of contracts which were *not* on file with the Commission, and over which the Commission had exercised no jurisdiction. The dispute was not over a rate; the subject matter of rate was never involved; nor was the effect of Section 4 of the Act at issue. The entire transaction between the parties was conducted exclusively outside the framework of the Act, and a question of Commission acts arose solely because contract cancellation became involved with timing of Commission issuance of a Section 7 certificate to *another* person *not* a party to the case nor to any of the contracts actually in dispute (*Cf.* R. 8, 12-13).

Here, there is no factual or legal similarity. Neither a private agreement, nor a rate, can have binding legal effect as such. Legal rate and rights are controlled by the effective rate on file, and that rate depends solely upon Commission action under Section 4. The subject matter is wholly and completely controlled under Section 4, both as to rate *level* in cents-per-Mcf and as to periods of *time* in which any rate may be charged by a seller and paid by a buyer. Here, that rate relationship is the only issue, and the overriding, paramount authority of the Act and orders thereunder supersede any pre-existent relationship under state or federal law. *Cf.* Colorado's argument and *Adams Express Co.* v. *Croninger*, 226 U.S. 491 (1913); *Southern Railway Co.* v. *Prescott*, 240 U.S. 632 (1916).

As innumerable cases relating to producers' rates reflect, where a rate schedule is on file, the rate in effect in cents-per-Mcf is governed exclusively by acts, determinations,

letter orders, and minutes of the Commission under Section 4. Those acts alone thereafter control both rate and rights of buyer and seller. Where a buyer or seller disagrees with such Commission actions under Section 4, the rate relationship can be changed only by overturning Commission actions by review under Section 19(b), or by subsequent tender of a new rate under Section 4. (See cases cited, Pan American Main Br., pp. 25-47).

However, Colorado refers to situations in which the day-to-day rate or price relationship between two private parties is not exclusively controlled by a comprehensive federal regulatory system (Colo. Br., pp. 8-10, 12-13).[5] For example, Colorado refers to *Pratt v. Paris Light, Gas & Coke Co.*, 168 U.S. 255 (1897), as an action involving the purchase price of a patented machine. But Colorado does not recognize the legal and practical difference where the very rate at issue is the subject matter to which the federal regulatory power exclusively attaches; with which the regulatory power is primarily concerned and must exclusively control; and which can be changed only by careful and timely compliance with a step-by-step process through a federal agency and exclusive federal appellate review, and then exclusively enforced in the United States District Courts. *Cf. Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 481 (1955).

Colorado thus ignores the distinctions in cases such as *Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, 258 U.S. 377 (1922). A determination by a court which would actually result in adjudication of controlling "com-

[5] *Natural Gas Pipe Line Co. of America v. Harrington*, 246 F. 2d 915 (5th Cir. 1957), cited by Colorado at p. 11, involved a period of time when the rate relationship was not subject to Commission acts under Section 4, and a rate was not on file. The paramount authority of the Commission over the rate relationship was not there discussed in the context of circumstances such as exist today, and as are shown in this record.

mon-law" or "equitable" rights is one thing. What is involved here are the wholly different circumstances where initial concealment of paramount federal pre-emption is quickly removed, and a state court must withdraw or trample upon federal pre-emptions (see Pan American Main Br., pp. 49-51, 55-56, and *Simpson v. Southewestern Railroad Co.*, 231 F. 2d 59 (5th Cir. 1956), *cert. den.*, 352 U.S. 828 (1956)).

Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263 (1960), relied upon by Colorado (Colo. Br., pp. 13, 16, 17, 21, 27), actually demonstrates that there is no "concurrent" court jurisdiction, *after* a rate is tendered for filing under Section 4. The dispute between buyer and seller in that case proceeded through Commission procedures under Section 4, into the Court of Appeals under Section 19(b), and thence into this Court on Writ of Certiorari. All of this was unnecessary, and none of these bodies had jurisdiction, if the act of the Commission under Section 4, in its conclusion as to which rate in cents-per-Mcf to accept for filing, did not thereafter fix, create, control or otherwise determine the rights and liabilities of buyer and seller, and the only rate that legally could be charged or paid for deliveries of gas in that transaction.

Under Colorado's theory, however, a separate collateral suit could have been maintained in a state court or under federal diversity jurisdiction for enforcement of views of buyer or seller. Or, under Colorado's theory, *when* that dispute *is* resolved under the Act, and a rate *is* accepted for filing under Section 4, the losing party could still relitigate its "common-law" claims in collateral actions outside the framework of the Act. Obviously, this is not permissible because federal law and the accepted rate control the parties' rights, but Colorado's theory would lead to such results (*Cf.* Colo. Br., pp. 17-18).

No producer has had the temerity—or misunderstanding of the Act, Regulations, and Commission authority—to

demand that any transmission company—such as Colorado—pay a "price" that may have been "agreed-upon" in a "private contract," which was actually different in cents-per-Mcf from the effective rate under Section 4. Producers bill and pipelines pay the cents-per-Mcf rate tendered under Section 4, accepted, filed, and made effective by Commission consideration of the tendered rate, its formal vote, its spreading of its action upon its minutes, and its issuance of letter orders such as appear in this record. The Commission's system of regulating a producer's rate, the legally effective rate level in cents-per-Mcf, and any changes of that exact level, all have rested exclusively upon these acts under federal law since 1954, and do today. Neither Colorado, nor Petitioners nor any other regulated company can, by collateral suit in a court of general jurisdiction, claim "right" to some other price and invoke a "concurrent" jurisdiction to override these acts.

C. Differences in form of pipelines' and producers' schedules do not change legal effect of effective rates under the Act

Colorado next tries to distinguish legal effect of Commission acceptance and filing a producer's rate from comparable control of a pipeline's rate (Colo. Br., pp. 15-18). The current difference in form of a producer's "rate schedules"—which may include contracts affecting a rate—and a pipeline company's "tariffs" or "rate schedules"—which also may include contracts and separate service agreements[6]—does not control Commission jurisdiction and duties under Section 4, or the resultant binding legal effect of the cents-per-Mcf rate level under Sections 4, 19, and 22.

[6] See "contracts" or "service agreements" discussed in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958).

For either producer or pipeline, the effective rate level in cents-per-Mcf, at all points in time, is dependent upon what the Commission does after either producer or a pipeline tenders to the Commission a rate for filing under Section 4. If the rate is suspended, it is not charged except after further Commission order under Section 4. If the rate is rejected, as frequently occurs, another rate must be tendered which is consistent with Commission reasons for rejecting the first tender. But, if the rate is accepted for filing, and made effective, it is the only legal rate, for either a producer or a pipeline, and the *Montana-Dakota* rule applies to either rate. See *Signal Oil and Gas Co. v. Federal Power Commission*, 238 F. 2d 771, 773 (3rd Cir. 1956).

Sunray Mid-Continent Oil Co. v. Federal Power Commission, 364 U.S. 137 (1960), actually is contrary to Colorado's argument. (See Colo. Br., pp. 5, 15, 16). That case involved term of a Section 7 certificate, and questions of the effective rate under Section 4 were not at issue. (*Cf. Sun Oil Co. v. Federal Power Commission*, 364 U.S. 170 (1960), wherein Commission jurisdiction, the Act, and the Regulations were recognized as precluding a collateral change of cents-per-Mcf rate level, even though the new higher rate had been agreed-upon in a private agreement.) In *Sunray*, as quoted by Colorado at page 16 of its Brief, this Court stated that *Mobile* recognized that there are "two sources of price and supply stability" under the Act. The first noted was "provisions of private contracts," but these have no legal effectiveness in control of the rate outside the federal Act and actions thereunder.[7] The second "source" noted was "the public regulatory power," which here means that the rate relationship rests exclusively upon that federal power *after* a rate is on file and effective under Section 4. A producer's rate thus is

[7] See constructions of Section 4 and the Regulations in producer rate cases after *Mobile*, cited at page 32 of Pan American's Main Brief.

"legalized," as Colorado states it, *only* through Section 4, and thereafter rests upon the federal regulatory process in which questions of what is or should be the effective rate—including interpretation of contracts as in the *Texas Gas Transmission Corporation* case, *supra*—are exclusively determined. For either producer or pipeline this is not "abrogation" of "contracts." This means only that all of the jurisdictional provisions of the Act are exclusive and paramount, and that after a rate *is* effective, *only* federal law can control.

Colorado's supposed distinction in the effect of regulatory control because of form of a producer's schedule thus is refuted by all of federal constructions of the Act since 1954. Each of the cases discussed by Colorado which have involved litigation over the effective rate level in cents-per-Mcf for a producer, thus initially began before the Commission under Section 4 and proceeded to judicial review under Section 19(b) (*cf.* Colo. Br., pp. 20, 21, 25, 32, 34; and, Pan American Main Br., pp. 35-37, 42-43, and fn. 26, p. 55). None is authority for Colorado's theory that "retroactive payments" by a producer can be authorized in collateral actions, citing state or federal law, outside the exclusive statutory procedures (Colo. Br. p. 20).

D. The Montana-Dakota case illustrates statutory finality even where a contract relationship could antecede the effective rate

Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), is not pertinent here as "an attractive escape," as Colorado alleges, but illustrates exactly why this Court is correct in applying statutory finality to a rate effective under a federal statute.

Montana-Dakota involved the Federal Power Act—which like the Natural Gas Act does not "abrogate" initial contracting powers.[8] Years after tender and effectiveness,

[8] See *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

collateral attack was made, including allegations that rested in theories that could have actually been drawn only from state law (*cf.* Colo. Br., p. 19). These theories may have been "the excuse offered by the plaintiff," as Colorado puts it, but there is an obvious parallel with the gamut of Cities' more recent "excuses," which now range from theories of involuntary payment, to alleged express "agreement," to "implied agreement," to "unjust enrichment," to "restitution," to collateral change of the rate in a state court, and to "enforcement" by a state court of the alleged "filed rate." As in *Montana-Dakota*, belated, collateral attack is made—although in a state court here—and as in *Montana-Dakota*, it is alleged that a rate "merely accepted" for filing and thereby effective, is not binding as the legal rate controlling rights and liabilities of the parties.

Here, as in *Montana-Dakota*, the statute precludes such collateral change, and Section 22 further bars state court intrusion. Here, as in *Montana-Dakota*, unless statutory finality required by the Act is adhered to, there can be no stability, no presumption of certainty from rates effective under Section 4, and no result except a quick unraveling of the entire regulatory system.

In this instance, it is Petitioners who are victims four years later, of afterthoughts, uncommunicated theories as to controlling private "agreements," or *post-facto* readings of *Mobile*. And, in this instance, the attack is by a person—itself a "natural-gas company" under the Act—which never proceeded in timely manner and has ignored all agency and statutory procedures, but now comes forward with this complicated attack apparently devised after collateral decisions as to validity of a state pricing order. However, Colorado apparently does not recognize that unless statutory finality bars such an effort, all rates now effective under Section 4—including Colorado's—can be subjected to such belated collateral revision in courts of general jurisdiction.

Because instability and debilitation of Commission control of the rate level could only result, the Commission itself thus applies the *Montana-Dakota* principle to producers' rates effective under Section 4.[9] Colorado presents neither factual, legal, nor policy reasons for a contrary construction of the Act.

E. Commission procedures in regulation of producers are not defective, and establish the binding, legally effecti[illegible] rate at all points in time

With certain factual errors, Colorado joins Cities' efforts to discredit Commission procedures for regulating producers, and then argues therefrom that Commission acts under Section 4 are not binding and controlling, and the rate thus is outside the scope of Section 22 (Col. Br., pp. 21-38).

In response to Cities, Petitioners have corrected inferences that Order No. 174 established a process independent of then existing Regulations, Rules of Practice and Procedure, and the Act itself (*Cf.* Colo. Br., pp. 22-23); have shown the binding nature and effect of the Commission's action under the Regulations and the Act, as construed by all of the federal Courts of Appeals which have considered disputes over producers' effective rate levels under Section 4; (*Cf.* Colo. Br., pp. 24-26); have shown the proper "accommodation" of contracts as "rate schedules," the *Mobile* holding, and the provisions of Sections 4, 19 and 22 (*Cf.* Colo. Br., pp. 26-28); and have made reference to the facts as to Cities' silence and absence of communication to Petitioners, or the Commission, in 1954, 1955, and 1957, of contrary views it now expresses (Colo. Br., pp. 28-33).

Here, it is sufficient to note that all of the authorities relied upon by Colorado to discredit Commission pro-

[9] See Appendix A to Pan American Reply to Brief of Respondent Cities Service Gas Company.

cedures involved timely review under Section 19(b) of specific Commission actions under Section 4. None is authority for a collateral review and attack or for state court assumption of jurisdiction over the regulated rate. Thus, in referring to *Great Northern Railway Co.* v. *Merchant's Elevator Co.*, 259 U.S. 285 (1922), Colorado overlooks the condition stated there—"If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this Court. . . ." (Colo. Br., p. 28). Colorado seeks to excuse Cities in its belated bypassing into courts of general jurisdiction, but likewise fails. The Commission's procedures have been held valid by the federal Courts of Appeals, and even if they are defective, as Colorado and Cities seek to imply, one who has not availed himself of such procedures as do exist, cannot attack those procedures collaterally. See *Yakus* v. *United States*, 321 U.S. 414 (1944).

Colorado also refers to a Commission Notice of Proposed Rulemaking in Docket No. R-168 (see Colo. Br., pp. 33; 23 Fed. Reg. 2973). As shown on its face, the "rule" under consideration would have *prospective* application only, and could not apply *retroactively*. Colorado correctly states that the Commission has not yet promulgated such a rule, but omits to point out that with respect to rates already in effect, the Commission asked for comment upon questions almost identical to those posed in the remand directive in *Portsmouth Gas Co.* v. *Federal Power Commission*, 247 F. 2d 90 (D.C. Cir. 1957). These questions included the effect under the Act of acquiescence, lack of timely protest, lack of timely review, and procedural estoppel where a person—such as Cities here—had not complied with or pursued the available administrative and statutory remedies, or made known to the Commission in a timely manner any objections to a tendered rate. At no time in that proceeding, nor in any other, has the Commission intimated a view that a state court could assume jurisdiction over the subject matter of the rate, enter judgments

contrary to the Commission's earlier acts of 1954, 1955, and 1957 under Section 4, and change the rate by collateral "judgment." To the contrary, even in "settlement order" proceedings, to which Colorado refers (Colo. Br., p. 34), the Commission has carefully pointed out the fulfillment of the statutory conditions precedent. Here, of course, Cities merely launched its attacks in state courts shortly after the Commission issued its Notice.

Colorado also discusses *Cities Service Gas Co. v. Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958), involving Magnolia Petroleum Company (now Socony-Mobil Oil Company, Inc.), the subject of a "settlement order." Parallel expressions by Cities have been discussed in reply to Cities' Brief.

What Colorado here calls a "strange argument" as to binding effect of Commission acts under Section 4, is the same "argument" made by Cities itself in that case, and is the considered holding of the Court of Appeals as to necessity for timely review because of finality of Commission actions under Section 4.[10] Further, the conclusions of the Tenth Circuit as to finality and reviewability of acts at the end of the Section 4 review of a rate tender, have also been stated by the United States Court of Appeals for the Third Circuit (*Natural Gas Pipe Line Co. of America* v. *Federal Power Commission*, 253 F. 2d 3, 9

[10] The record certified here from the Supreme Court of Delaware includes Cities' memorandum to the Court of Appeals covering the binding effect of acts under Section 4, "aggrievement" therefrom, and the necessity for immediate, timely review ("Memorandum in Opposition to Motion to Dismiss and In Support of Application for Stay," filed October 11, 1957, on behalf of Cities Service Gas Company in the United States Court of Appeals for the Tenth Circuit, Case No. 5666). It was not printed here because of availability to Petitioners and Respondents, but apparently Colorado has not had the benefit of review of that document.

(3rd Cir. 1958), *cert. den.*, 357 U.S. 927 (1958)), and th United States Court of Appeals for the Fifth Circui (*Continental Oil Co.* v. *Federal Power Commission*, 23 F. 2d 839, fn. 3, 841, 842 (5th Cir. 1956)). The thousand of producers' rates being charged today in such regulate transactions rest exclusively for stability, finality, an effectiveness upon these filing procedures and these Com mission acts.

CONCLUSION

The *Amici Curiae* interject additional collateral attack upon the past and current system of producer regulatio under Section 4, and repeat implications that proper con structions of Section 22 and application of statutor finality in a collateral attack seven years after Commis sion action, would be contrary to purposes of the statute However, these contentions do not obscure the points tha the Supreme Court of Delaware has misconstrued Section 4 and 19, and that statutory finality must be accorded t rates enforceable only under Section 22.

For the foregoing reasons, and those set forth in Peti tioners' Main Briefs and Replies to the "Brief of Respond ent Cities Service Gas Company," it is respectfull submitted that the judgment below should be reversed, an that the Writ of Prohibition prayed for by Petitioners i

the Supreme Court of the State of Delaware thereupon should issue.

Respectfully submitted,

JOHN J. WILSON
FRANK H. STRICKLER
815 Fifteenth St., N. W.
Washington 5, D. C.

PAUL F. SCHLICHER
135 East 42nd St.
New York 17, N. Y.

ALFRED C. DECRANE, JR.
P.O. Box 2332
Houston 1, Texas

Attorneys for Petitioner in No. 81

BYRON M. GRAY
New England Building
Topeka, Kansas

WILLIAM J. GROVE
CARROLL L. GILLIAM
DOW, LOHNES AND ALBERTSON
600 Munsey Building
Washington 4, D. C.

Attorneys for Petitioner in No. 80

L. A. THOMPSON
W. W. HEARD
P.O. Box 591
Tulsa 2, Oklahoma

Of Counsel in No. 80

April, 1961